85-1332

No. ____

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1986

WILLIAM CAVALIERI

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA

Respondent

PETITION FOR A WRIT OF CERTIORARI

Joseph J. Devanney, Esquire
Attorney for Petitioner
Suite 415, Valley Forge Plaza
King of Prussia, PA 19406
(215) 337-7023
Attorney I.D. No. 25215

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTIONS PRESENTED

Whether 18 PSCA Section 4105 (Pennsylvania "bad check" statute) and its subsequent interpretation by the Pennsylvania Supreme Court is unconstitutional under the due process clauses of the 5th and 14th Amendments to the United States Constitution.

Whether the 18 and PCSA Section 3926 (Pennsylvania "theft of services" statute) and its subsequent interpretation by the Pennsylvania Supreme Court is unconstitutional under the due process clauses of the 5th and 14th Amendments to the United States Constitution.

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PETITION FOR A WRIT OF CERTIORARI

William Cavalieri, Petitioner, respectfully prays that this court issue a writ of certiorari to review the decision of the Pennsylvania Supreme Court entered in the above case on December 10, 1985. That court similarly denied Petitioner's request for allowance of appeal and upheld a decision entered against the Petitioner by the Pennsylvania Superior Court on May 17, 1985. That decision of the Superior Court, in turn, upheld the criminal conviction of the Petitioner by his alleged violation of two separate sets of Pennsylvania statutes.

OPINIONS BELOW

This petition results from a denial of the Pennsylvania Supreme Court for an allowance of appeal following the upholding of the Defendant's conviction on criminal charges by the Pennsylvania Supreme Court. In chronological order, the relevant orders and decrees by the Pennsylvania Supreme and Superior Courts are as follows:

1. An order issued on December 10, 1985 over the signature of the prothonotary of the Pennsylvania Supreme Court indicating that the Court of Common Pleas of Montgomery County had its judgment affirmed by the Supreme Court of Pennsylvania. (Appendix A).

2. An order and opinion issued on May 17, 1985 by the Pennsylvania Superior Court affirming the conviction of the Defendant in the Court of Common Pleas of Montgomery County, Pennsylvania. (Appendix B).

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

In the event this court determines that the issuance of a writ other than certiorari might better aid the jurisdiction of this court and the administration of justice, the Defendant also invokes the jurisdiction of this court under the All Writs Act, as amended, 28 U.S.C. Section 1651(a).

STATUTES INVOLVED

This case involves the interpretation and application of the following statutes: 18 PSCA Section 4105 and 18 PSCA Section 3926 (Appendix C).

STATEMENT OF THE CASE

This appeal arises by way of two unrelated trials involving the same criminal Defendant. Mr. Cavalieri was sentenced by the same judge on both cases, at the same time, and the appeals were consolidated for appeal. They remained consolidated to this date.

On February 26, 1981, the Defendant was arrested and charged with bad checks (18 PCSA Section 4105). The basis of the allegation was that the Defendant wrote five separate checks on his then existing account at Lincoln National Bank, Boyerstown, Pennsylvania. He did not, however, write the checks directly to the benefit of the bank. On the contrary, he had been permitted "overdraft" privileges by the bank manager, who honored all the checks drawn to the individual drawees. Subsequently, it was determined that the Defendant was unable to pay the "overdrafts" and the bank acting to protect its interests, charged the Defendant with bad checks despite the facts that the checks had been honored by the bank. In February, 1982, the Defendant was convicted following a non-jury trial of passing bad checks and he was subsequently sentenced to 2 to 7 years imprisonment.

The other case against the Defendant was, in all essences, unrelated to the first. On December 1, 1981, the Defendant was again arrested and charged with theft by failure to make required disposition of funds and criminal conspiracy. The charge of theft of services (18 PSCA 3926) was added at a later date. The theory of the Commonwealth case was that the Defendant, who was a building contractor, had retained sub-contractors who were not paid. Reduced to its essence, the Commonwealth's argument was that the failure to pay the subcontractors, and the failure of the Defendant to have a proper surety bond in place for them, constituted criminal intent on his part to defraud.

Following a jury trial on May 19, 1982, Defendant was found not guilty of the original charges, but guilty of the charge of theft of services. He was subsequently sentenced to 1 to 7 years to run consecutive to the other charges cited above.

REASONS FOR GRANTING THE WRIT

I. The conviction of the Defendant based upon the statute 18 Section 4105 is contrary to the Defendant's due process rights under the 5th and 14 Amendments to the United States Constitution.

A. Substantial evidence on the record indicates, beyond any doubt, that the checks were in fact honored by the banks and that it was only the interpretation given to the Court of Commonwealth v. Mutlik 406 A.2d 516 (1979) that led to his conviction.

At the outset, it must be clearly stressed by the Petitioner that he is not challenging the validity of 18 Section 4105 on its face. Indeed, on its face, the statute is quite clear and straight forward. However, and unfortunately, the *Pennsylvania Supreme Court and Commonwealth v. Mutlik*, 406 A.2d 516 (1979), twisted the clear meaning of the statute to reach an unjust and illogical interpretation which has effected many defendants, including the present Petitioner. In Mutlik, the Pennsylvania Supreme Court ruled that the Commonwealth does not have to prove an intent to defraud. All that a supposed victim must do is demonstrate the fact that the check was passed, that the check was not honored by a bank and that, following a 10-day notice, the check was not subsequently honored. The rational of the Pennsylvania Supreme Court was that a Defendant "is not being imprisoned for being a debtor. Rather, he is imprisoned for intentionally disrupting the flow of and undermining the soundness of commercial paper in this Commonwealth."

It is the decision in Mutlik, and not the face of the statute, which the Petitioner is contesting. Two points are evident. First, even under the language of Mutlik, the Petitioner's conviction can not stand since the checks were, in fact, honored. However, the trial court in the present case and all subsequent appellate courts have simply applied the logic that the flow of paper in and out of the banks has been disrupted and, therefore, under the rational of Mutlik, the Defendant may be convicted under Section 4105. That this interpretation stains due process is self-evident. Even apart from the particular facts of this case, Mutlik does not give fair warning to individuals that their conduct may be deemed criminal. Common sense dictates that there will be many instances in which "bad checks" will be passed with an innocent or innocuous purpose. Because of the failure to give notice, and its subsequent impact upon potential defendants, Mutlik is unconstitutional and the Defendant's conviction under its provisions must be struck down.

B. 18 PSCA Section 3926 is unconstitutional on its face as a denial of due process under the 5th and 14 Amendments to the United States Constitution.

First, the Petitioner will concede that unlawfully enacted legislation does, in fact, carry a presumption of constitutionality. *Singer v. Sheppard*, 464 Pa. 387, 346 A.2d 897 (1975), however, the rule of Lenity permits an attack upon the statute itself as being vague, overbroad or failing to give adequate notice.

C. United States v. Enmons 410 US 396, 35 Lawyer's Edition E.D. 2d.379, 93 Supreme Court 1007 (1973).

It is respectfully submitted that precisely the situation concerning the rule of Lenity is present here. A fair reading of paragraph (A)(1) of Section 3926 can only lead to the conclusion that it is overly broad and misleading as to what may or may not be covered. What, for

example, is a "other trick or artifice" is left entirely without definition. The same is equally true for the word "deception". Indeed, this paragraph, in effect, states that a person is guilty of theft of services by deception if, in fact, he "deceives." The tautological reasoning of this paragraph and the statute itself is self-evident. Quite simply, it does not give fair notice to anyone of what or may not constitute "deception" or "trick or artifice." As such, it is overly broad and must be deemed unconstitutional.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH J. DEVANNEY, Esquire

DATED: February 7, 1986

CERTIFICATION OF SERVICE

I, JOSEPH J. DEVANNEY, ESQUIRE, do hereby certify that a true and correct copy of the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit was forwarded by first class mail on this date to:

Joseph Hylan, Esquire
District Attorney's Office
of Montgomery County
Montgomery County Courthouse
Norristown, PA 19404

JOSEPH J. DEVANNEY

DATED: February 7, 1986

APPENDIX

§3926. Theft of Services

(a) Acquisition of services.

(1) A person is guilty of theft if he intentionally obtains services which he knows are available only for compensation, by deception or threat, or by false token or other trick or artifice to avoid payment for the service.

(2) As used in this section, the word "service" includes, but is not limited to, labor, professional service, transportation service, the supplying of hotel accommodations, restaurant services, entertainment, the supplying of equipment for use, and the supplying of commodities of a public utility nature such as gas, electricity, steam and water, and telephone service.

(3) Where compensation for service is ordinarily paid immediately upon the rendering of such service, as in the case of hotels and restaurants, refusal to pay or absconding without payment or offer to pay gives rise to a presumption that the service was obtained by deception as to intention to pay.

§4105. Bad checks.

(a) Offense defined.—A person commits an offense if he issues or passes a check or similar sight order for the payment of money, knowing that it will not be honored by the drawee.

(b) Presumption.—For the purposes of this section as well as in any prosecution for theft committed by means of a bad check, an issuer is presumed to know that the check or order (other than a post-dated check or order) would not be paid, if:

(1) the issuer had no account with the drawee at the time the check or order was issued; or

(2) payment was refused by the drawee for lack of funds, upon presentation within 30 days after issue, and the issuer failed to make good within ten days after receiving notice of that refusal.

(c) Grading.—An offense under this section is a misdemeanor of the second degree if the amount of the check or order exceeds $200; otherwise it is a summary offense.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
	:	No. 3020
WILLIAM CAVALIERI, *Appellant*	:	Philadelphia, 1982

Appeal from the Judgment of Sentence of September 29, 1982 in the Court of Common Pleas of Montgomery County, Criminal Division, Nos. 735-81, 713-82, 3820-82.

Before: McEWEN, BECK and CERCONE, JJ.

MEMORANDUM:

This appeal comes to us by way of two separate trials and fact situations involving the same criminal defendant. The appeals were consolidated for submit argument only and accordingly this memorandum is drafted covering both trials under one judicial journal number. This memorandum is broken into two parts covering both trials, the orders of the trial judges are dealt with at the end of each part. The sentences originally imposed were made concurrent by the sentencing judge, who was the same judge at both hearings.

I. Appeal from Order of the Court of Common Pleas No. 735-81.

This appeal follows a conviction for Theft by Deception for the writing and kiting of bad checks involving three banking institutions and several individuals. The factual history of this case is as follows:

On February 26, 1981, a criminal complaint was filed against the defendant charging him with bad checks and theft by deception (18 Pa.C.S.A. §4105 and §3922, respectively). The defendant was found guilty in

a non-jury trial and sentenced September 29, 1982. Chronologically, the defendant wrote five checks on his then existing account at Lincoln National Bank. This account was in the name of the Cavalieri Group, Inc., a Pennsylvania Corporation of which the defendant was president. This account had a balance of $711.74 as of September 30, 1980. On September 29, 1980, defendant wrote a $3,000.00 check drawn on an account at the National Bank of Boyertown. This account was in the name of Frederick Construction Company, another Pennsylvania Corporation of which the defendant was president. Purportedly, this $3,000.00 check deposited at Lincoln National Bank was to cover the previous five checks totaling $2,888.05 drawn on Lincoln National Bank.

On October 1, 1980, Lincoln Bank paid the five checks on the basis of funds already in the account, and the $3,000.00 deposit; however, the $3,000.00 check had not yet been honored by the National Bank of Boyertown. On October 7, 1980, the $3,000.00 check was dishonored and returned to Lincoln National by the National Bank of Boyertown due to insufficient funds.

On October 10, 1980, the defendant wrote a $4,000.00 check drawn on Philadelphia National Bank and deposited it at Lincoln National Bank. This account was also in the name of Frederick Construction Company. This check was also returned due to insufficient funds.

Procedurally, a criminal complaint was filed on February 26, 1981, and the defendant was arrested on March 2, 1981. The case was called to trial on June 30, 1981, when the defendant signed a Rule 1100 waiver. This allows the extension of time for the commencement of trial and was initiated by the defendant to obtain counsel. The Commonwealth then had until October 28, 1981, to bring defendant to trial, and on August 4, 1981, the defendant again signed a Rule 1100 waiver for the

same reason. The Commonwealth then had until December 2, 1981 to bring defendant to trial, and on September 10, 1981, the defendant executed another Rule 1100 waiver in order to prepare for trial. It was at this point that the court appointed the public defender to represent the defendant. The new trial date was now January 8, 1982. On November 13, 1981, the defendant executed yet another Rule 1100 waiver in order to conduct an investigation and prepare for trial. The Commonwealth then had until March 13, 1982, to bring the defendant to trial. At this point the defendant obtained private counsel and the public defender was removed. Sitting without a jury, the trial judge heard this case February 9 and 10, 1982, finding defendant guilty of eight counts of theft by deception (18 Pa.C.S.A. §3922) and seven counts of bad checks (18 Pa.C.S.A. §4105).

He was sentenced to two to seven years imprisonment and ordered to pay a $5,000.00 fine on Bill of Information 735.13 (Theft by Deception).

The first issue raised on appeal is the trial court's refusal to dismiss the case based upon the Commonwealth's failure to timely bring the case under Rule 1100. The trial court has adequately discussed this issue and properly resolved it against the defendant.

As to whether Theft by Deception statute (18 Pa.C.S.A. §3922) is unconstitutional, the Superior Court addressed this issue and declared this statute constitutional in *Commonwealth v. Linder*, 284 Pa. Super. 327, 425 A.2d 1126 (1981).

The last two issues of whether the verdict is contrary to the evidence and the weight of the evidence and that the sentence imposed was harsh and/or excessive, were properly disposed of in the trial court opinion.

Accordingly, the judgment of sentence of the trial court is affirmed.

Sentence affirmed.

II. Appeal from Order of the Court of Common Pleas No. 3820-81 and 713-82.

Appeal has also been taken on a different trial regarding different criminal charges filed against William Cavalieri. These charges were two counts of violations of Pennsylvania insurance law 40 Pa.C.S.A. §§253 and 832, as well as one count of theft of services 18 Pa.C.S.A. §3926. In a jury trial, the defendant was found guilty on all three counts. This appeal follows.

Factually, this case involves two companies both owned by the defendant and the sub-contractors whom the jury found were defrauded by the defendant. The defendant was a construction developer whose company received a contract to build a restaurant. His construction company was called Frederick Construction Company which served as general contractor for the restaurant project. The defendant retained the necessary sub-contractors; however, prior to obtaining the needed loans for the project, the lendor, National Bank of Boyertown, required the defendant to secure a performance bond and a material/labor bond to guarantee payment to any creditor of the defendant should financial exigencies arise.

The defendant obtained these bonds through American Surety Brokers, Inc., an entity also owned by the defendant, an entity not licensed by the Pennsylvania Insurance Commission as required by the Pennsylvania Insurance Code.[1] The defendant had apparently issued insured bonds covering himself by his own insurance company which he presented to the National Bank of Boyertown to show that he met the loan requirements. It was on this point of acting as an insurance broker without a license of which the jury also found him guilty.[2]

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1. 40 Pa.C.S.A. §832.
2. 40 Pa.C.S.A. §253.

Ultimately, the Frederick Construction Company failed to pay the sub-contractors who then had to rely upon the surety bond which was also found worthless.

On December 1, 1981, a criminal complaint was filed against the defendant charging him with Theft by Failure to Make Required Disposition of Funds and Criminal Conspiracy. On February 3, 1982, a criminal complaint was filed charging him with violations of the Pennsylvania Insurance Code. On March 30, 1982, the charges were consolidated. After a second preliminary hearing on April 19, 1982, necessitated because the district justice had been a detective in this same case in the first preliminary hearing, before a different district justice the charges were found to have been established *prima facie*. The conspiracy charge, however, was dismissed at the preliminary hearing stage. On May 3, 1982, the charges were called to trial whereupon the Commonwealth moved to add the Theft of Services charge. On May 11, 1982, the defendant was acquitted of the original theft charge (failure to make required disposition of funds); however, the jury found him guilty of Theft of Services and violations of the Insurance Code. On May 19, 1982, the defendant filed post-verdict motions which, by order dated July 15, 1982, were denied. This appeal follows.

The trial judge's opinion is separate from the sentencing judge because the trial judge left the bench to return to private practice. Accordingly, the defendant was sentenced September 29, 1982, for 1-7 years for the theft of services and insurance fraud violations; he was also sentenced, consecutively, to 2-7 years for the bad checks and theft of deception charges dealt with at the beginning of this memorandum in another trial. The sentencing judge was the same for both trials.

The substance of this appeal involves a matrix of issues some of which have been adequately reasoned in the trial court opinion and we have nothing further to add.

The first issue on appeal is whether it was proper for the trial judge to consolidate the theft by failure to make required disposition of funds and the insurance violations. The most recent case on point is *Commonwealth v. Shirey*, ____Pa. Super. ____, 481 A.2d 1315, at 1330 (1984):

> Where informations arise from distinct criminal episodes or transactions, consolidation is a matter within the sound discretion of the trial judge, whose decision will be reversed only upon a manifest abuse of discretion or prejudice to the defendant. *Commonwealth v. Morris*, 493 Pa. 164, 425 A.2d 715 (1981); *Commonwealth v. Moore*, 463 Pa. 317, 344 A.2d 850 (1975). In such instances, consolidation is proper if the evidence is capable of separation by the jury so that there is no danger of confusion, and the evidence of each offense would be admissible in a separate trial for the other.[3] (Citations omitted).

As such, we are of the opinion that the offenses charged are separable by the jury and that consolidation was proper.

The lower court has adequately explained the rationale for allowing the charge of theft of services to be added to the charge of theft by failure to make required disposition of funds. We have nothing further to add.

The next issue is evidentiary in whether Exhibits 22 and 23 were properly admitted. These were documents from the Insurance Department of Pennsylvania indicating that William Cavalieri was not licensed as an insurance broker (Exhibit 22) and that his surety company was not licensed as an insurance agent or broker (Exhibit 23). The leading case on this point is *Commonwealth v. Slider*, 229 Pa. Super. 97, 323 A.2d 376 (1974). *See also Commonwealth v. Burkett*, 300 Pa. Super. 67,

3. This standard is now codified in Pa.R.Crim.P. 1127A(1)a, effective July 1, 1982.

445 A.2d 1305 (1982). *In Slider* the only requirement is that the document must be prepared pursuant to an official duty. 323 A.2d at 377. The policy behind this is to avoid inconvenience and disruption of public affairs by requiring public officials to appear in court. These exhibits 22 and 23 were prepared pursuant to the duty of the Insurance Commissioners and as such were properly admitted.

As to whether or not the trial judge improperly instructed the jury on the intent aspect of 18 Pa.C.S.A. §3926 (Theft of Services), we do not agree there was error. *Commonwealth v. Crawford*, 285 Pa. Super. 169, 427 A.2d 166, at 173 (1981) holds that ". . . in evaluating a challenge to the correctness of instructions is whether the area is adequately, accurately, and clearly presented to the jury (citations omitted)." We find that the theft of services charge was adequate, accurate and clear. Specifically, the third element of the charge was "three, that the defendant obtained the services intentionally. A person of course acts intentionally if it is his conscious object to engage in conduct of a particular nature." (N.T., May 11, 1982, p. 888). This is the point of contention for the defendant pertaining to intent. 10 Pa.C.S.A. §302(b)1(i) defines kinds of culpability: "a person acts intentionally with respect to a material element of an offense when: (1) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result . . ." This is the definition of intent in the crimes code and it is effectively the same as the judge's charge.

The next issues concern the constitutionality of the insurance code statutes: 40 Pa.C.S.A. §234 and 832, acting as an agent without a license and doing business as a surety without proper authorization. The principal attack is the rule of lenity from the *United States v. Enmons*, 410 U.S. 396, 35 L.Ed.2d 379, 93 S. Ct. 1007 (1973) which attacks the statute itself as vague, overbroad or failing to give adequate notice, and, how the

statute is applied. This argument is unpersuasive. We recognize from *Singer v. Sheppard*, 464 Pa. 387, 346 A.2d 897 (1975) that a lawfully-enacted legislation carries a presumption of constitutionality unless it clearly, palpably and plainly violates the constitution. Such clarity or certitude does not exist here.

This same discussion applies to the argument concerning the unconstitutionality of 18 Pa. C.S.A. §3926, theft of services.

As to whether the trial judge abused his discretion in refusing a change of venue the appellant cites us to no authority in his brief. But the matter is settled that this is in the discretion of the lower court. *Commonwealth v. Richardson*, 476 Pa. 571, 383 A.2d 510, (1978), *cert. denied* 436 U.S. 910.

As to whether the verdict is contrary to the weight of the evidence and the evidence itself, we find the appellant's argument to be unconvincing and have nothing further to add to the trial judge's opinion. Regarding the remaining issues of error in sentencing and the sentence itself, we again have nothing further to add to the sentencing judge's opinion.

Accordingly, the judgment of the sentence of the lower court is affirmed.

Sentence affirmed.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
	:	No. 3020
WILLIAM CAVALIERI, *Appellant*	:	Philadelphia, 1982

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Montgomery County be, and the same is hereby Affirmed.

BY THE COURT

J. Haniel Henry
PROTHONOTARY

Dated: May 17, 1985

Supreme Court of Pennsylvania

Eastern District

December 16, 1985

Joseph J. Devanney, Esquire
Suite 415
Valley Forge Plaza
King of Prussia, PA 19406

RE: Commonwealth of Pennsylvania v.
William Cavalieri, Petitioner
NO. 734 E.D. ALLOCATUR DOCKET 1985

Dear Mr. Devanney:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above captioned matter:

"December 10, 1985.

Petition Denied.

Per Curiam."

Very truly yours,

PATRICK TASSOS
Deputy Prothonotary

/mz
cc: Ronald T. Williamson, Esquire